

STEPHEN M. TILLERY (*pro hac vice*)
stillery@koreintillery.com

GARRETT R. BROSHUIS (Bar No. 329924)
gbroshuis@koreintillery.com

MARC WALLENSTEIN (*pro hac vice*)
mwallenstein@koreintillery.com

DIANE MOORE (Bar No. 214903)
dmoore@koreintillery.com

KOREIN TILLERY, LLC
505 North 7th Street, Suite 3600
St. Louis, MO 63101
Telephone: (314) 241-4844
Facsimile: (314) 241-3525

CLIFFORD H. PEARSON (Bar No. 108523)
cpearson@pswlaw.com

DANIEL L. WARSHAW (Bar No. 185365)
dwarshaw@pswlaw.com

BOBBY POUYA (Bar No. 245527)
bpouya@pswlaw.com

THOMAS J. NOLAN (Bar No. 66992)
tnolan@pswlaw.com

PEARSON, SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, CA 91403
Telephone: (818) 788-8300
Facsimile: (818) 788-8104

BENJAMIN E. SHIFTAN (Bar No. 265767)
bshiftan@pswlaw.com

JILL M. MANNING (Bar No. 178849)
jmanning@pswlaw.com

PEARSON, SIMON & WARSHAW, LLP
350 Sansome Street, Suite 680
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008

Plaintiffs' Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

AARON SENNE, et al., Individually and on
Behalf of All Those Similarly Situated;

Plaintiffs,

vs.

OFFICE OF THE COMMISSIONER OF
BASEBALL, an unincorporated association
doing business as MAJOR LEAGUE
BASEBALL; et al.;

Defendants.

CASE NO. 3:14-cv-00608-JCS (consolidated
with 3:14-cv-03289-JCS)

CLASS ACTION

**JOINT SUBMISSION CONCERNING
THE TRIAL PLAN**

Courtroom: F, 15th Floor
Judge: Honorable Joseph C. Spero

1 The parties have met and conferred and make this joint submission concerning the trial plan.¹

2 **I. PLAINTIFFS' PROPOSED TRIAL PLAN**

3 **A. Plaintiffs' Statement of The Issues that Remain to Be Tried for the Classes and**
 4 **Collective.**

5 Two recent orders from the Court have significantly reduced the number of issues to be
 6 resolved at the June 1, 2022 trial. First, on February 11, 2022, the Court bifurcated Plaintiffs'
 7 individual claims from the class and collective claims for purposes of pretrial matters and trial. ECF
 8 No. 1047. The June 1 trial will focus solely on the class and collective claims, while the individual
 9 claims will be tried at a later date. This trial plan therefore focuses on the class and collective claims
 10 that are the subject of the June 1 trial.²

11 Second, the Court's summary judgment order (ECF No. 1071) resolved key liability issues and
 12 most of Defendants' defenses. The Court held that players are "employees," that they perform at least
 13 some "work," and that MLB jointly employs players. *See id.* Liability has been established for the

14
 15 ¹ This trial plan presents a roadmap of the parties' current plan based on their current understanding
 16 of the issues in dispute and the evidence that will be presented at trial, and is not intended to limit or
 17 change the scope of the trial. The parties reserve the right to present additional or different evidence
 18 or arguments not set forth herein during the course of the trial as permitted by the Court or
 19 authorized by law. The parties understand that each side will have approximately 70 hours to present
 its case-in-chief, for a total of not more than 140 hours. ECF No. 843, at 1:24 ("The length of trial
 will be not more than seven (7) weeks").

20 ² There are three Rule 23(b)(3) classes, an FLSA collective, and a (b)(2) class. In its summary judgment
 21 order, the Court summarized the classes as follows: "The (b)(2) class and the Arizona and Florida
 22 (b)(3) classes assert claims under Arizona and Florida law concerning the work that minor leaguers
 23 perform during spring training, extended spring training, and instructional leagues in those two states.
 24 The claims of the (b)(2) class also cover work performed during the Championship Season in Arizona
 25 and Florida. Because Arizona and Florida do not have overtime laws, the claims asserted by these
 26 classes only involve alleged minimum wage violations and derivative claims. The California (b)(3) class
 asserts claims under California law concerning the work that minor leaguers perform during the
 regular Championship Season in the California League. The claims asserted by this class involve both
 minimum wage and overtime violations. It also asserts derivative claims under California's Labor
 Code, such as waiting time penalties (§§ 201-203) and wage statement penalties (§ 226)." ECF No.
 1071 at 8. The FLSA collective covers "the same scope of work as is captured in the Rule 23(b)(3)
 classes and include both minimum wage and overtime claims under the FLSA." *Id.*

Arizona Class: “[T]he Court concludes that Plaintiffs are entitled to summary judgment on their claim for violation of Arizona’s minimum wage law and therefore are liable for treble the amount of unpaid wages, attorneys’ fees and costs as to that claim.” *Id.* at 141. The jury will be asked to determine the amount of damages and penalties owed. For the California Class, the Court has ruled in favor of Plaintiffs on the threshold liability issues and on the wage statement claims. All that remains for the jury to decide are hours worked and the amount of damages and penalties owed. For the Florida Class and the FLSA Collective, Defendants’ seasonal and amusement defense, 29 U.S.C. § 213(a)(3), remains to be tried, along with the amount of damages.

The (b)(3) claims and FLSA Collective claims are summarized as follows:

	Training Seasons	Championship Season	Minimum Wage	Overtime	Other Statutory Violations	Statutory Liquidated Damages	Seasonal and Amusement Defense?
AZ	Yes	No	Yes	No	Recordkeeping (§23-364)	Yes (treble damages)	No
CA	No	Yes	Yes	Yes	Waiting Time (§201, 202 and 203); Wage Statement (§226)	Yes (double damages on minimum wage claims)	No
FL	Yes	No	Yes	No	No	Yes (double damages)	Yes
FLSA	Yes	No	Yes	Yes	Recordkeeping (29 U.S.C. § 211(c))	Yes (double damages)	Yes

For the class and collective claims, the following are issues for the jury to decide:

- Whether Defendants’ conduct was willful;
- The amount of work performed by class members;
- The damages for the minimum wage violations in all Classes and the FLSA Collective;
- The overtime violations for the California Class and FLSA Collective;
- Whether Defendants are entitled to any wage credits;
- Arizona recordkeeping penalties under A.R.S. § 23-364; and
- Whether Defendants’ seasonal and amusement exemption defense (29 U.S.C. § 213(a)(3)) bars any claims.

1 Plaintiffs propose that the Court will decide the following issues for the class and collective
2 claims:

- 3 • Liquidated damages, prejudgment and post-judgment interest, attorneys' fees and costs
4 as permitted by law for all Classes and the Collective;
- 5 • An updated amount of wage statement penalties under California Labor Code § 226 to
6 take into account the 2021 California League season (the Court already awarded these
7 penalties through 2020);
- 8 • Waiting time penalties under California Labor Code § 203;
- 9 • What injunctive or declaratory relief to award to the (b)(2) class after the jury reaches its
10 verdict; and
- 11 • The penalties to award under California's Private Attorneys General Act for
12 Defendants' violations of Labor Code §§ 201-204, 208, 226, 510, 558, 1194, and 1197.

13 **B. Plaintiffs' Plan for Trying the Class and Collective Claims.**

14 **1. Trial Structure.**

15 For the issues to be tried to the jury, Plaintiffs propose the following order: First, Plaintiffs will
16 present evidence regarding liability and damages, primarily from live fact and expert witnesses, in their
17 case-in-chief. Fact witnesses will testify regarding player work routines, training worksites, and how
18 the players were not paid minimum wage or overtime. Fact witnesses will further testify that minor
19 league spring training takes place at minor league facilities that are separate from major league spring
20 training facilities, for purposes of the seasonal and amusement exemption. Some deposition testimony
21 may also be played in Plaintiffs' case-in-chief, primarily about player work routines. Plaintiffs may also
22 request that interrogatory responses, admissions, and any stipulations entered into by the parties will
23 be read into the record at this stage. Plaintiffs will call two expert witnesses to testify live: a survey
24 expert and an expert statistician who will provide testimony regarding the hours worked by the Class
25 Members and the amount of damages owed to the Classes and Collective.

26 Second, Defendants will present their evidence regarding liability, damages, and offset defenses
27 in their case-in-chief, along with their presentation of the seasonal and amusement exemption.
28

1 Third, Plaintiffs will present rebuttal evidence regarding the seasonal and amusement exemption
2 and other issues presented in Defendant's case-in-chief, as necessary. Rebuttal evidence regarding the
3 seasonal and amusement exemption would likely be comprised primarily of video excerpts from the
4 depositions of current and former MLB and Club employees (*i.e.*, defense witnesses) who are outside
5 the subpoena power of the Court. It could also include some live witness testimony, either from
6 defense witnesses who are within the subpoena power of the Court, or additional plaintiff witnesses.

7 The advantage of this approach is that it will avoid (or at least minimize) witnesses testifying
8 multiple times throughout the course of the trial. Plaintiffs' live witnesses will testify primarily (and
9 potentially exclusively) during Plaintiffs' case-in-chief. Defendants' witnesses will testify in their case-
10 in-chief. And rebuttal witnesses will be primarily video clips of deposition testimony.

11 Plaintiffs do not believe that a phased approach is appropriate in this case, meaning an
12 approach that addresses, *e.g.*, the seasonal and amusement exemption first, before liability and
13 damages. A phased approach would likely require witnesses to testify multiple times. It would increase
14 the burden on witnesses and likely result in a lengthier trial. It would also increase the risk of jury
15 confusion, especially if the seasonal and amusement exemption were tried first. That exemption is not
16 relevant to the majority of claims that remain to be tried, and it should not be the subject of the jury's
17 initial focus. Instead, Plaintiffs should be accorded the opportunity to present their case-in-chief first,
18 in the typical fashion.

19 Plaintiffs will put forward evidence relating to all Defendants during their case-in-chief, but
20 Plaintiffs do not plan to split their case-in-chief by Defendant or by "establishment." There is no
21 need to do so in the case-in-chief. The core policies and related evidence are common across all work
22 locations and defendants, including: the failure to pay salaries outside of the championship season, the
23 failure to pay overtime, and the failure to keep records of hours worked. Plaintiffs' damages model
24 measuring hours worked likewise applies to each Defendant and is best heard by the jury as a single
25 damages estimate for all defendants collectively. The certified classes are not subdivided by MLB
26 Club, and the liability and damages issues that will arise during the Plaintiffs' case-in-chief are best
27 addressed witness-by-witness rather than club-by-club or location-by-location. Indeed, many of
28

1 Plaintiffs' witnesses worked for multiple MLB Clubs, so they will be testifying about multiple
 2 Defendants at once—and will testify that work routines and policies were consistent across teams.

3 Defendants are free to stage their evidence in their case-in-chief as they wish, and Plaintiffs
 4 understand that they may proceed Defendant-by-Defendant. That approach is sensible, because
 5 Defendants bear the burden of proof for each purported establishment at issue. But Plaintiffs' case-
 6 in-chief need only address the seasonal and amusement exemption witness-by-witness—the Club-by-
 7 Club analysis can come during the defense case and in rebuttal.

8 For purposes of the exemption, there are roughly 15 training complexes³ in Florida that will be
 9 at issue during the trial with respect to the Florida (b)(3) class. Of those, four involve physical
 10 separation of at least half a mile between the minor league training facilities and the major league
 11 training facilities.⁴ The other 11 involve physically adjacent minor league and major league training
 12 facilities, but Plaintiffs will show that the minor league facilities are separate from the major league
 13 facilities for purposes of the exemption, because the facilities are functionally separate and players
 14 only occasionally interchange between them. Plaintiffs will also show that Defendants have failed to
 15 meet the exemption's receipts test.

16 During the recent case management conference, the Court inquired about possible additional
 17 worksites in Florida that would need to be analyzed for purposes of the (b)(2) class. Plaintiffs believe
 18 that the (b)(2) class presents just three possible additional worksites to examine: Jackie Robinson
 19 Ballpark (used by a Cincinnati Reds minor league affiliate), 121 Financial Park (used by a Miami
 20 Marlins minor league affiliate), and Admiral Fetterman Field (used by a Cincinnati Reds affiliate and
 21 then later by a Minnesota Twins affiliate). *See* ECF 973-1 (Defendants' list of purported
 22 establishments). Other minor league affiliates based in Florida use the same roughly 15 worksites
 23 described above that are already the subject of the (b)(3) class. The (b)(2) class involves injunctive or
 24

25 _____
 26 ³ Defendants claim that the Cardinals' and Marlins' Florida facilities should be combined into a single
 establishment, which Plaintiffs dispute.

27 ⁴ The physically separated spring training facilities include the following Clubs: Yankees, Blue Jays,
 28 Orioles, and Pirates (along with the Red Sox's previous facility).

1 declaratory relief that will be resolved by the Court, not the jury. *See Paradise Valley Investigation &*
 2 *Patrol Servs., Inc. v. U.S. Dist. Ct., Dist. of Arizona*, 521 F.2d 1342, 1342–43 (9th Cir. 1975) (no right to
 3 jury trial in wage-and-hour action for injunctive relief); *Unidisc Music, Inc. v. Shelby*, No. 17-CV-04287,
 4 2019 WL 3291578, at *5 (C.D. Cal. Mar. 19, 2019) (no right to jury trial on count for injunctive and
 5 declaratory relief). Accordingly, Plaintiffs propose that any evidence that goes solely to these three
 6 additional worksites should be presented to the Court after the jury returns its verdict, ideally through
 7 post-trial briefing, or if necessary, through live witness testimony during a short evidentiary hearing.
 8 The Court can then decide any fact issues regarding those three establishments. There is no need to
 9 burden the jury with factfinding regarding these three additional worksites, because that factfinding is
 10 only pertinent for injunctive relief that will be decided by the Court. When combined with the
 11 evidence solicited during the jury trial regarding the roughly 15 training complexes that are at issue for
 12 the Florida (b)(3) class, the Court will have all the evidence it needs to determine the appropriate
 13 scope of injunctive or declaratory relief for the (b)(2) class.

14 **2.The Evidence To Be Presented.**

15 Plaintiffs’ case-in-chief will focus on the issues that will be tried to the jury for which Plaintiffs
 16 have the burden of proof: the amount of work performed by players, and the minimum wage
 17 violations, overtime violations, and damages and penalties that result.

18 The evidence of hours worked will match the legal principles set forth by the Ninth Circuit in
 19 this case. As the Ninth Circuit held, the continuous workday rule eliminates any need for an activity-
 20 by-activity tracing of the workday because the workday includes all time between the beginning and
 21 end of the workday “whether or not the employee actually engages in work throughout that entire
 22 period.” *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 941 (9th Cir. 2019). The Ninth Circuit
 23 further explained that under the “suffer or permit” standard of hours worked, there are two possible
 24 ways for the workday to begin: (1) if players “were required to report” at a certain time, then the
 25 workday would begin. *Id.* at 943; or (2) if players “arrived of their own volition but engaged in work
 26 activities,” then the workday would begin. *Id.* at 943-44. Either way, “the continuous workday
 27 doctrine eliminates the need for plaintiffs to prove which activities they engaged in throughout the
 28 day.” *Id.* at 944. And the Ninth Circuit noted the possibility that the jury could decide that activities

1 like early “hitting practice with coaches” or “supervised weightlifting” started the workday. *Id.* at 944
 2 n.24. The Ninth Circuit approved of Plaintiffs’ plan to use representative evidence and averages to
 3 prove these matters for the Classes and Collective. *Id.* at 943-47.

4 Because Defendants did not keep records of the hours worked by a particular player on a given
 5 day, the estimate of hours worked need not be precise. “Defendants should not ‘be heard to complain
 6 that the damages lack the exactness and precision of measurement that would be possible had [they]
 7 kept records in accordance with the [statutory] requirements,’ even if their ‘lack of accurate records
 8 grows out of a bona fide mistake as to whether certain activities or non-activities constitute work.’” *Id.*
 9 at 944 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)).

10 Plaintiffs will offer multiple layers of evidence to meet their burden. Witnesses, including minor
 11 league players and their supervisors, will provide testimony regarding the work performed during the
 12 work periods at issue. Class representatives will confirm what is commonly known in the industry:
 13 players work long hours during the work periods at issue, quite often without pay. Such testimony
 14 from the named Plaintiffs will be the starting point of evidence of work routines.

15 Testimony from Defendants’ own witnesses will also be presented; indeed, many of those
 16 witnesses already confirmed that there is a core work routine in each of the work periods at issue. *See*
 17 Kriegler Supp. Rep. at Exs. 10A-10D, ECF No. 984-2 (summarizing testimony on work routines from
 18 Defendant witnesses). Some of that testimony will be presented through deposition designations, and
 19 some of it will be presented live. Plaintiffs anticipate that certain former minor league coaches and
 20 other personnel will willingly testify live at trial, and Plaintiffs anticipate calling other coaches and
 21 supervisors by trial subpoena.

22 Another layer of evidence will be presented through Plaintiffs’ experts. Plaintiffs’ survey expert,
 23 Dr. J. Michael Dennis, collected responses from 720 Minor Leaguers. ECF No. 782 at 6. The survey
 24 collected data for each type of season, for home versus away game days, and for game days versus
 25 non-game days during the training seasons. Plaintiffs’ expert statistician, Dr. Brian Kriegler, then
 26 created a model of hours worked by combining the survey evidence with several other types of
 27 evidence, including game schedules (showing when games took place and the type of game that took
 28

1 place), eBIS data and rosters, travel data, and game lengths. The resulting model shows the hours
2 worked by players for every type of workday at issue.

3 Plaintiffs will explain to the jury that when computing hours worked and the resulting damages,
4 Dr. Kriegler used two conservative percentiles of the survey data: the 10th and 25th percentiles. He
5 validated his use of those percentiles by comparing them to data drawn from another layer of
6 evidence—daily itineraries showing the work that took place on a given day. Dr. Kriegler analyzed
7 over 1,600 daily itineraries and coded the first required activity performed by any player according to
8 the itinerary and the first required activity performed by *every* player according to the itinerary. *See*
9 Kriegler Supp. Rep. at 50-53, ECF No. 984-2. The latter evinced the latest possible start of the
10 workday for *all* players on a given day, while the former evinced the time by which at least some
11 players began work on a given day according to an itinerary. Although the daily itineraries do not
12 include all work routinely performed by players,⁵ the data drawn from them matched the percentiles
13 used by Dr. Kriegler. The average latest start time from the itineraries matched the survey data's 10th
14 percentile, while the average earlier start times from the itineraries matched the survey data's 25th
15 percentile. Dr. Kriegler further supports his methodology with analysis of other evidence in the
16 record, such as an examination of the deposition testimony.

17 In addition to Dr. Kriegler's summary of his daily itinerary analysis, actual daily itineraries will
18 be submitted into evidence. Defendants' own witnesses have already confirmed that they could think
19 of no better document to show what took place on a given day. Witnesses will further confirm that
20 the events on the daily itineraries typically took place, and additional work typically occurred outside
21 the itineraries as well.

22 That proof of hours worked will be compared to Dr. Kriegler's analysis of payroll data, and
23 both liability and damages will be established. Dr. Kriegler's analyses show rampant minimum wage
24 violations in the Arizona and Florida Classes (during which wages were hardly ever paid), and
25

26 ⁵ Daily itineraries generally do not include time spent donning and doffing, performing strength
27 training that is supervised by coaches, and certain types of early work that regularly take place (like
28 early hitting in the cages with coaches or early bullpen work for pitchers). *See* Kriegler Supp. Rep. at
25 n.36, ECF No. 984-2.

1 rampant minimum wage and overtime violations in the California Class. Through Dr. Kriegler,
 2 Plaintiffs will also present evidence of the number of Arizona recordkeeping penalties.

3 In their own case-in-chief, Defendants will have a chance to try to show that Plaintiffs' evidence
 4 of hours worked is not reasonable. And Defendants can present evidence going to the seasonal and
 5 amusement exemption recognized under Florida law and the FLSA. Because it is an affirmative
 6 defense, Defendants will have the burden of proving what the establishments are, that the
 7 establishments are "frequented" by the public for an "amusement" or "recreational" purpose, and
 8 that "during the preceding calendar year, its average receipts for any six months of such year were not
 9 more than 33 1/3 per centum of its average receipts for the other six months of the year." *See* ECF
 10 No. 1071 at 125-38 (Court's summary judgment order on the defense).⁶ Defendants will also have the
 11 burden of showing that they are entitled to any wage credits from per diems that were purportedly
 12 provided during training seasons. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11th Cir.
 13 1982) (defendant has burden of showing wage credits). To do so, they must show that the per diems
 14 qualify as wages, and that they have provided sufficient evidence of the amount in per diems provided
 15 and any debits made from them.

16 Plaintiffs believe that Defendants will not meet their burden on some or all of these issues, and
 17 plan to move for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 as necessary. Plaintiffs
 18 plan to reserve time for a rebuttal case to, if needed, present evidence rebutting the seasonal and
 19 amusement exemption, Defendants' wage credit defense and any other issues raised during
 20 Defendant's case-in-chief.

21 After the jury enters its verdict, the Court will adjudicate the remaining issues: liquidated
 22 damages, prejudgment and post-judgment interest, attorneys' fees and costs permitted by law; the
 23

24 ⁶ Of note, Defendants are not invoking the seven-month operational test for the purported
 25 establishments at issue in this initial trial, which will focus on the training seasons and the California
 26 League. *See* ECF No. 1071 at 126, 133 (explaining that Defendants rely on the seven-month
 27 operational test with respect to the minor league affiliates during the championship season, but are
 28 relying on the receipts test with respect to the training seasons); *see also id.* at 105 n.27 (granting
 summary judgment on the defense with respect to the California League because California law does
 not recognize the defense).

1 additional wage statement penalties under Labor Code § 226 owed for the 2021 California League
 2 season (the Court already awarded these penalties through 2020); the waiting time penalties under
 3 California Labor Code § 203; the injunctive or declaratory relief to award to the (b)(2) class; and the
 4 California PAGA penalties to award.

5 **II. DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED TRIAL PLAN**

6 As the proponents of a class trial, the burden rests on the Plaintiffs alone to show that this case
 7 can be tried fairly on a class basis. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.
 8 2001) (plaintiff “bears the burden of demonstrating a suitable and realistic plan for trial of the class
 9 claims”).⁷ The few summary pages that Plaintiffs present here fail at that obligation, in part because
 10 this case has too many separate defendants, too many individualized damages issues, and too many
 11 varying state and federal laws to be tried in a manageable way. In Part III below, Plaintiffs again trot
 12 out the old chestnut that individual damages do not preclude class treatment, but this case is now at a
 13 different stage. Cases affirming class certification despite individual damage variations contemplate a
 14 later proceeding, after the class trial, where individual damage claims will be determined.⁸ But
 15 Plaintiffs are proposing to resolve damages in this current trial, and to do that without the
 16 individualized evidence that the case law universally contemplates, they must present a trial plan that
 17 demonstrates they can prove those damages reliably and fairly without it. The plan presented here
 18

19
 20 ⁷ *See also Feltz v. Cox Commc'ns Cal., LLC*, CV 19-2002 JVS (JDEx), 2021 WL 4947306, at *8 (C.D.
 21 Cal. Oct. 21, 2021) (rejecting plaintiffs’ trial plan and denying leave to present another because
 22 “[w]hile the Court is not requiring [plaintiffs] to present a fully formed workable trial plan, he is also
 23 not able to sit back and wait for [defendants] to do the same”); *Gartin v. S & M Nutec LLC*, 245
 24 F.R.D. 429 (C.D. Cal. 2007); *Sweet v. Pfizer*, 232 F.R.D. 360, 370 (C.D. Cal. 2005) (“The Ninth Circuit
 has clearly stated that plaintiffs seeking certification of a nationwide class in which numerous state
 laws apply bear the burden of demonstrating a trial plan.”); *In re Paxil Litig.*, 212 F.R.D. 539 (C.D. Cal.
 2003).

25 ⁸ Indeed, the Ninth Circuit noted that likelihood here. *Senne v. Kansas City Royals Baseball Corp.*, 934
 26 F.3d 918, 943 (9th Cir. 2019) (“Damages may well vary, and may require individualized calculations.”);
 27 *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (noting that certification may be
 28 appropriate “even though other important matters will have to be tried separately, such as damages”);
Vaquero v. Ashley Furniture Industries, Inc., 824 F. 3d 1150, 1155 (9th Cir. 2016) (“the ‘amount of
 damages is invariably an individual question’”) (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594
 F.3d 1087, 1094 (9th Cir. 2010)).

1 does not do that. Plaintiffs note that Dr. Kriegler has invented a “methodology for distribution” of
 2 his aggregated damages figures to individual players, but (a) there is a significant difference – a
 3 difference that invokes the Rules Enabling Act – between a mere distribution methodology and proof
 4 of damages actually incurred by an individual class member; and (b) Kriegler’s creation does not offer
 5 a method to allocate liability among the Club Defendants. That, too, runs afoul of the Rules Enabling
 6 Act, as described further in Part B below.

7 The purpose of a class action trial plan is not merely to describe the proposed course of the
 8 case and the evidence to be presented, but to establish that the evidence will be common to the class
 9 and representative of all class members, so that the jury can extrapolate from that evidence to draw
 10 reliable and fair conclusions about liability and damages for the entire class. That problem is even
 11 more acute here than in most large class actions, because Plaintiffs have brought their claims not
 12 against a single defendant, but against 23 separate entities, each of which is entitled to an assessment
 13 of its own liability and the damages that defendant should be required to pay. (The parties met and
 14 conferred over Plaintiffs’ original trial plan proposal, but Plaintiffs maintained, as they do here, that
 15 they had no interest in trying the case in phases, whether by claim, by state law, or by Club).
 16 Plaintiffs’ summary outline offers no basis to conclude that the evidence will be representative, as
 17 discussed in Part A below, or that it will support a verdict against each defendant under each
 18 applicable jurisdiction’s law, as explained in Part B. Finally, because the Court directed the parties to
 19 consider the trial plan jointly, Defendants offer some suggestions in Part C, but ultimately it is now
 20 clear, if it was not before, that this case cannot be fairly tried on a class basis.

21 **A. Plaintiffs’ Cursory Trial Plan Does Not Establish That the Case Will Be Tried With**
 22 **Representative Evidence.**

23 Instead of wrestling with the complexities of this multiple-defendant, multiple-jurisdiction class
 24 action seeking hundreds of millions of dollars in damages on behalf of multiple classes numbering in
 25 the thousands, Plaintiffs’ “trial structure” amounts to little more than “Plaintiffs will go first, then
 26 Defendants, then Plaintiffs again.” They say in Part I.A. that they will call “fact witnesses,” described
 27 in I.B. as including some unknown number of minor league players, coaches, and others, but without
 28 any showing or even an indication that the testimony of those hand-selected witnesses will be fairly

1 representative of the several classes, or even that they will have personal knowledge relevant to each
 2 of the Defendants. Nor do they offer any other reason to conclude that the hours these unidentified
 3 witnesses testify to having worked can be extrapolated to the classes as a whole to permit a reliable
 4 calculation of damages against each Club.⁹ As usual, Plaintiffs hope to sweep such objections away
 5 with the broom of *Anderson v. Mt. Clemens* and its “just and reasonable inference” standard, but that
 6 rule does not go as far as Plaintiffs wish it did. As the Seventh Circuit has explained, hours worked
 7 could be reconstructed from memory, inferred from the particulars of the jobs the [class
 8 members] did, or estimated in other ways — any method that enables the trier of fact to draw a
 9 “just and reasonable inference” concerning the amount of time the employee had worked
 10 *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (citations omitted); see also *Cruz*
 11 *v. Dollar Tree Stores, Inc.*, No. 07-2050 SC, 2011 WL 2682967, at *8 (N.D. Cal. July 8, 2011) (finding
 12 trial plan inadequate because the plaintiffs “have provided no reliable means of extrapolating from the
 13 testimony of a few exemplar class members to the class as a whole”); *Weigle v. FedEx Ground Package*
 14 *Sys., Inc.*, 267 F.R.D. 614, 624-25 (S.D. Cal. 2010) (rejecting trial plan in FLSA exempt
 15 misclassification case because the jury would hear testimony on individuals’ job duties but “will then
 16 need to extrapolate from all of the testifying witnesses to the entire class. But it is unclear which . . .
 17 tools they will have to perform that extrapolation. At worst it appears that they would be left to guess.
 18 This is too amorphous to expect a reasonable and rational result from any jury”). The lack of
 19 specificity about Plaintiffs’ trial plan with respect to witness testimony, and the lack of any guarantee
 20 that the evidence will be sufficiently representative to extrapolate those conclusions to the class as a
 21 whole, accordingly renders the plan inadequate.

22 Plaintiffs similarly say they will supplement that unspecified testimony with some number of
 23 daily itineraries, but again without even a suggestion that those documents will be sufficiently

24
 25
 26 ⁹ The concern about whether Plaintiffs’ planned witness testimony for trial will be sufficient to
 27 establish hours worked for the entire class is deepened by the comment in their motion to bifurcate
 28 that they envision using “a smaller number of witnesses” to prove their class claims than their
 individual claims. ECF No. 1041 at 6.

1 representative to be relied upon to establish the schedules that players actually worked for each
 2 affiliate or Club in each year.

3 Ultimately, as it has been since the beginning, they intend to rely entirely on the Survey and Dr.
 4 Kriegler's analysis as their purportedly representative evidence. But the expert testimony suffers from
 5 fairness and manageability problems wholly separate from the scientific reliability questions that the
 6 Court resolved in ruling on the *Daubert* motions. First, the survey responses on which Dr. Kriegler
 7 exclusively relies to calculate hours worked are inadmissible hearsay; Defendants will have no
 8 opportunity to cross-examine survey respondents on their (unsworn) estimates of arrival and
 9 departure times. And while an expert may rely on inadmissible material in formulating an opinion, the
 10 underlying data does not thereby become admissible. *Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254,
 11 1261-62 (9th Cir. 1984); *V5 Technologies, LLC v. Switch, Ltd.*, 501 F. Supp. 3d 960 (D. Nev. 2020).
 12 Thus, under Plaintiffs' plan, the admissible evidence from class members of hours they worked will
 13 come only from the carefully curated list of individuals whose testimony Plaintiffs elect to offer.
 14 Again, there is no basis to conclude from Plaintiffs' curt overview above that that evidence will be at
 15 all representative.

16 Instead, the verdicts Plaintiffs seek against each Club defendant on behalf of absent, non-
 17 testifying class members will depend entirely on Dr. Kriegler's testimony. That is not permissible.
 18 The plaintiffs in *McCleery v. Allstate Ins. Co.*, 37 Cal. App. 4th 434, 2019 WL 3072621 (Cal. App. 2019),
 19 attempted the same thing: lacking common proof that would establish liability of each defendant, they
 20 relied on an expert witness's analysis of otherwise inadmissible survey results.¹⁰ The court rejected
 21 that trial plan as "inadequate an unfair," noting that defendants could not cross-examine the survey
 22 respondents and that the expert's opinion was too thin a reed on which to rest a judgment in favor of
 23 all class members against all defendants. *Id.* at 453-54 ("no case of which we are aware, and plaintiffs

24
 25 ¹⁰ Although *McCleery* was decided under California rules of procedure, the California standards for
 26 class certification closely parallel those of Fed. R. Civ. P. 23, and the requirement that plaintiffs
 27 present a trial plan demonstrating that "the claims [are] susceptible of resolution on a common basis"
 28 and that "individual questions can be managed with an appropriate trial plan" mirrors federal law. *See*
id. at 449 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 529-30 (Cal. App. 2014),
 451.

1 refer us to none, suggest a trial may be conducted solely on the evidence of an expert witness relying
 2 on an anonymous double-blind survey, no matter how scientific the survey may be”).

3 **B. Plaintiffs’ Plan Does Not Account For Material Differences Among Parties and**
 4 **Applicable Laws.**

5 Plaintiffs’ “plan,” such as it is, also would blur all of the state and federal laws at issue and the
 6 differences among the classes, and throw evidence relevant only to the seasonal exemption into the
 7 same undifferentiated mass – a “shapeless, freewheeling trial,” *Espenscheid*. 705 F.3d at 776, that leaves
 8 to the jury the labor of sorting out those differences and the team-by-team applicability of the
 9 exemption (or, more likely, hopes that the jury will overlook such distinctions). In individual trials,
 10 though, the Defendants would be entitled to separate verdicts on their liability (and damages) under
 11 Florida, Arizona, California, and federal law, and separate consideration of each Club’s qualification
 12 for the seasonal exemption. The Rules Enabling Act prohibits a sacrifice of those separate verdicts
 13 and separate jury consideration of each claim and defense as to each Club in the name of convenience
 14 or manageability.

15 This proposed lumping together of Plaintiffs’ claims is one aspect of a larger problem. There is
 16 no defendant class in this case, nor could there be. The Defendants are 22 separate corporate entities,
 17 and MLB. Each of those entities, as a matter of due process, is entitled to its own verdict, and to
 18 demand that the Plaintiffs prove, by just and reasonable inference, both the hours they worked for
 19 that entity and the damages that that entity is obligated to pay. *See, e.g.*, Ninth Circuit Model Civil Jury
 20 Instruction 1.8 (“You should decide the case as to each [defendant] separately.”). Plaintiffs,
 21 unsurprisingly, declare that their damages evidence “is best heard by the jury as a single damages
 22 estimate for all defendants collectively,” *supra* at 4, but offer no authority for that reductive approach
 23 nor even articulate a theory as to how damages can be accurately or fairly awarded against the
 24 Defendants “collectively.” They also note that the classes are not subdivided by Club, *id.*, but that is
 25 not the point: the Court’s choice to aggregate the class members’ claims does not aggregate the
 26 Defendants or reduce the Plaintiffs’ obligation to prove their case against each Defendant individually.
 27
 28

C. If The Case Is To Be Tried on a Class Basis, The Seasonal Exemption Should Be Tried First, Followed By The State Law Claims Seriatim.

Defendants have no obligation to construct a workable trial plan out of Plaintiffs' generalities, and the fact is that this case cannot be manageably – or, more importantly, fairly – tried on a class basis. Not infrequently, courts that have certified classes or collectives revisit that decision when the plaintiffs finally must specify how the trial will be conducted, and the new focus on the particulars of trial makes plain that it cannot be done in a manageable way.¹¹

At the March 25, 2022 case management conference, however, the Court directed the parties to consider the trial plan jointly. In an effort to be responsive to that directive, and without waiving our position that the case cannot be appropriately tried on a class basis for the reasons described above, Defendants offer the following suggestions as a means at least of reducing the jury confusion likely to result from Plaintiffs' hodgepodge.

1. The Court Can Try The Seasonal Exemption Before Empaneling A Jury.

Rather than simply throwing all of the issues and laws of several jurisdictions into a monolithic presentation for the jury, Defendants propose that the Court try any remaining issues as to the seasonal exemption—remotely, if the Court so preferred—and that a jury be empaneled after the Court rules on the application of the exemption. Doing so could streamline the jury trial that followed, and save the jury from having to consider detailed evidence that is relevant to this highly technical defense, but not to any other issue in the case.

¹¹ See, e.g., *Hamilton v. Wal-Mart Stores, Inc.*, No. 5:17-cv-01415-AB (KKx), 2019 WL 1949457, at *16 (C.D. Cal. Mar. 4, 2019) (decertifying class because “even at this very late stage of the case, Plaintiffs still have not articulated their method or plan to try this case”); *Rollins v. Taylor Bros Inc.*, No. C14-1414 JCC, 2016 WL 59242943, at *1 (W.D. Wash. May 3, 2016) (noting that the court had certified a class, “[b]ut the Court’s holding was predicated on the parties submitting a manageable trial plan”); *Cruz*, 2011 WL 2682967, at *8; *Weigle*, 267 F.R.D. at 624-25; *Marlo v. UPS*, 251 F.R.D. 476, 487 (C.D. Cal. 2008) (“The Court has broad discretion to manage class action practice, but this does not relieve a party of its responsibilities to articulate a clear trial plan when requested. . . . It is possible through development of reliable common proof and clearer vision for how to try this case that Plaintiff could have avoided this situation. However, the Court must review the fairness and efficiency of class treatment based on the record before it. Here, there is a lack of common proof to support a class-wide judgment. The Court concludes that individualized issues will predominate if this case were to proceed to trial.”).

1 The seasonal exemption is an affirmative defense with respect to the claims of the: (i) FLSA
 2 collective for minimum wage and overtime during the training periods at each Club's spring training
 3 facility establishment in Arizona or Florida (through March 23, 2018, when SAPA passed); (ii) Rule
 4 23(b)(3) Florida class for minimum wage, during the training periods at the spring training facility
 5 establishments in Florida; and (iii) Rule 23(b)(2) class, covering the same claims as the Rule 23 (b)(3)
 6 Florida class, plus claims under Florida law for the championship season at 3 additional
 7 establishments in Florida where only championship season games are played.

8 At the outset, Defendants submit that even with a bench trial on the seasonal exemption, it is
 9 virtually impossible to solve the manageability problems that exist with this case. The seasonal
 10 exemption is evaluated on a year-by-year basis for each of the relevant establishments. There are a
 11 total of 40 establishments at issue in this case that will require 40 mini-trials to determine what the
 12 scope of the establishment is (*i.e.*, whether the major and minor league operations at the spring
 13 training facilities are considered single or separate establishments), and whether the establishment
 14 meets the gross receipts or seasonal test for *each year* at issue, spanning 14 years for the Florida
 15 establishments and 8 years for the Arizona establishments.¹² Indeed, the Court recognized the patent
 16 unmanageability of trying the seasonal exemption for this number of establishments at the recent
 17 March 25, 2022 conference.

18 Defendants have summarized below the relevant establishments for purposes of the seasonal
 19 exemption, which include: (i) 19 spring training facility establishments in Florida, where Defendants
 20 intend to rely upon the gross receipts test for each year; (ii) 1 spring training facility establishment in
 21 Florida for the Baltimore Orioles, where Defendants intend to rely upon the seasonal test for each
 22 year; (iii) 3 championship season affiliate establishments in Florida, where Defendants intend to rely
 23

24
 25 ¹² The gross receipts test considers the establishment's average gross receipts for the "preceding
 26 calendar year." 29 U.S.C. § 213(a)(3). Therefore, Defendants will present evidence regarding the
 27 receipts prong from 2008 through 2021 with respect to Plaintiffs' claims under Florida law as to the
 28 Florida-based establishments (because the limitations period under Florida law is February 2009
 through the present); and from 2010 through 2017 with respect to Plaintiffs' claims under the FLSA
 as to the Arizona-based establishments (because the limitations period under the FLSA is February
 2011 through March 23, 2018, when SAPA passed).

upon the seasonal test for purposes of the Rule 23(b)(2) class only; and (iv) 17 spring training facility establishments in Arizona, where Defendants intend to rely upon the gross receipts test for each year.

Florida Spring Training Facility Establishments – Gross Receipts Test

MLB Club(s)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Atlanta Braves	Champion Stadium	(b)(3) and FLSA	February 2009 – December 2019
Atlanta Braves	CoolToday Park	(b)(2), (b)(3) and FLSA	February 2020 – present
Baltimore Orioles	Ed Smith Stadium	(b)(2), (b)(3) and FLSA	February 2009 – present
Boston Red Sox	City of Palms Park and Player Development Complex	(b)(3) and FLSA	February 2009 – December 2011
Boston Red Sox	JetBlue Park	(b)(2), (b)(3) and FLSA	February 2012 – present
Detroit Tigers	Publix Field at Joker Marchant Stadium and Tigertown Minor League Complex	(b)(2), (b)(3) and FLSA	February 2009 – present
Houston Astros	Osceola County Stadium and surrounding practice fields and facility	(b)(3), FLSA	February 2009 – December 2016
Houston Astros	The Fitteam Ballpark of the Palm Beaches	(b)(2), (b)(3), FLSA	February 2017 – present
Miami Marlins / St. Louis Cardinals	Roger Dean Chevrolet Stadium	(b)(2), (b)(3), FLSA	February 2009 – present

MLB Club(s)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Minnesota Twins	CenturyLink Sports Complex and Hammond Stadium	(b)(2), (b)(3), FLSA	February 2009 – present
New York Mets	Clover Park	(b)(2), (b)(3) and FLSA	February 2009 – present
New York Yankees	George M. Steinbrenner Field and Yankees Complex	(b)(2), (b)(3), FLSA	February 2009 – present
Philadelphia Phillies	BayCare Park and Carpenter Complex	(b)(2), (b)(3), FLSA	February 2009 – present
Pittsburgh Pirates	LECOM Park and Pirate City	(b)(2), (b)(3), FLSA	February 2009 – present
Tampa Bay Rays	Charlotte Sports Park	(b)(2), (b)(3), FLSA	February 2009 – present
Toronto Blue Jays	TD Ballpark and Bobby Mattick Training Center	(b)(2), (b)(3), FLSA	February 2009 – December 2018; February 2020 - present
Toronto Blue Jays	Jack Russell Memorial Stadium	(b)(3), FLSA	2019
Washington Nationals	USSSA Space Coast Complex and Space Coast Stadium	(b)(3), FLSA	February 2009 – December 2016
Washington Nationals	The Ballpark of the Palm Beaches	(b)(2), (b)(3), FLSA	February 2017 – present

Florida Spring Training Facility Establishment – Seasonal Operations Test

MLB Club(s)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Baltimore Orioles	Buck O'Neill Complex at Twins Lake Park	(b)(2), (b)(3) and FLSA	February 2009 – present

Florida Championship Season Establishments – Seasonal Operations Test

Minor League Affiliate (MLB Club)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Daytona Tortugas (Cincinnati Reds)	Jackie Robinson Ballpark	(b)(2) only	Present
Jacksonville Jumbo Shrimp (Miami Marlins)	The Baseball Grounds of Jacksonville	(b)(2) only	Present
Pensacola Blue Wahoos (Miami Marlins)	Blue Wahoos Stadium	(b)(2) only	Present

Arizona Spring Training Facility Establishments – Gross Receipts Test

MLB Club(s)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Arizona Diamondbacks	Salt River Fields at Talking Stick	FLSA	February 2011 – March 2018
Chicago Cubs	HoHoKam Stadium and Fitch Park	FLSA	February 2011 – December 2013
Chicago Cubs	Sloan Park/Cubs Park	FLSA	February 2014 – March 2018
Chicago White Sox	Camelback Ranch-Glendale	FLSA	February 2011 – March 2018
Cincinnati Reds	Goodyear Ballpark and practice fields	FLSA	February 2011 – March 2018

MLB Club(s)	Establishment	Rule 23(b)(2), (b)(3), FLSA	Applicable Limitations Period
Cleveland Guardians/ Indians	Goodyear Ballpark and Player Development Complex	FLSA	February 2011 – March 2018
Colorado Rockies	Salt River Fields at Talking Stick	FLSA	February 2011 – March 2018
Kansas City Royals	Surprise Stadium	FLSA	February 2011 – March 2018
Los Angeles Angels	Tempe Diablo Stadium	FLSA	February 2011 – March 2018
Los Angeles Dodgers	Camelback Ranch- Glendale	FLSA	February 2011 – March 2018
Milwaukee Brewers	American Family Fields of Phoenix/Maryvale Baseball Park	FLSA	February 2011 – March 2018
Oakland Athletics	Papago Park Sports Facility and Phoenix Municipal Stadium	FLSA	February 2011 – December 2014
Oakland Athletics	Fitch Park	FLSA	February 2015 – March 2018
San Diego Padres	Peoria Sports Complex	FLSA	February 2011 – March 2018
San Francisco Giants	Scottsdale Stadium and Indian School Park	FLSA	February 2011 – March 2018
Seattle Mariners	Peoria Sports Complex	FLSA	February 2011 – March 2018
Texas Rangers	Surprise Stadium	FLSA	February 2011 – March 2018

The seasonal exemption will be tried on a Club-by-Club basis and evidence presented for each year as required under the statute. The evidence will consist of testimony from witnesses for each Club regarding the scope of the establishments at issue, and the gross receipts or seasonal operations of each establishment, for each year, and possibly some testimony from MLB witnesses.

1 Determining the Scope of the Spring Training Facility Establishments. The first issue to be
 2 tried is the scope of the spring training facility establishments. Defendants moved for summary
 3 judgment on this issue and presented evidence that each Club's spring training facility was a separate
 4 establishment that satisfied the exemption because the facilities (including the main stadiums and
 5 back-fields where training and games are also held) were "distinct, physical places of business." (Dkt.
 6 980 at 21-26.) In opposition, Plaintiffs maintained that major league spring training and minor league
 7 spring training were separate establishments on the same premises for all 30 Clubs; however, the only
 8 evidence Plaintiffs cited (and only for some Clubs) was that the main stadium and back-fields were
 9 physically separated from each other. (Dkt. 1019 at 32-33.) On reply, Defendants explained that
 10 Plaintiffs needed to establish *all three of the factors* under 29 C.F.R. § 779.305 to demonstrate that there
 11 was more than one establishment at a single location, specifically: (i) physical separation; (ii)
 12 functional separation, having separate records and bookkeeping; and (iii) no interchange of employees
 13 between the unit. (Dkt. 1029 at 13-15.)

14 Defendants submitted evidence that Plaintiffs did not—and indeed, could not—make such a
 15 showing. (*Id.*) Thereafter, at the Court's direction, the parties submitted a joint stipulation of all
 16 undisputed facts as to the establishment issue, but limited to those facts contained in the summary
 17 judgment record. (Dkt. 1062.) Because Plaintiffs cannot satisfy all three factors for any of the
 18 establishments on that record, Defendants respectfully submit that they are entitled to summary
 19 judgment on this issue. However, if the Court disagrees and denies summary judgment, then all 22
 20 Defendants Clubs, as well as the 8 Dismissed Clubs will present additional evidence from the media
 21 guides which are part of the record in this case but for which only sections had been submitted on
 22 summary judgment, plus testimony from Club employees as to (i) physical integration between major
 23 and minor league facilities at the spring training establishments; (ii) functional integration, including
 24 centralized books and records covering major and minor league players by each Club; and (iii)
 25 interchange of employees between each Club's major and minor league operations at the spring
 26 training facilities.

27 Gross Receipts Test for Spring Training Facility Establishments. Once the scope of the spring
 28 training facility establishments is determined, each of the 22 Defendant Clubs and the 8 Dismissed

1 Clubs will present evidence that the average gross receipts at the 19 Florida and 17 Arizona spring
 2 training facility establishments outlined above satisfy the receipts test for each year covered by the
 3 exemption. The Clubs will rely on the previously-submitted evidence, but also will provide evidence
 4 that there is no broadcast revenue from spring training games (although Defendants respectfully
 5 submit that any broadcast revenue is not relevant to the gross receipts analysis¹³). During summary
 6 judgment briefing, Plaintiffs failed to demonstrate that the gross receipts records the Clubs produced
 7 resulted in any establishment failing the gross receipts test for any year during the limitations period,
 8 and Defendants submit that Plaintiffs will be unable to make such a showing at trial on this issue.

9 Seasonal Operations Test for the Remaining Establishments. There are 4 separate
 10 establishments where Defendants intend to rely upon the seasonal operations test—not the gross
 11 receipts test—to meet the exemption: as explained below, 3 championship season affiliate
 12 establishments in Florida (2 affiliates for the Miami Marlins and 1 affiliate for the Cincinnati Reds),
 13 and 1 spring training facility establishment in Florida for the Baltimore Orioles, where minor league
 14 spring training is held each year.

15 *First*, the Rule 23(b)(2) class includes claims under Florida law with respect to activities
 16 performed during the championship season in Florida, among other claims. As noted above, there
 17 are 3 minor league affiliate establishments in Florida where championship season games are held that
 18 are distinct physical places of business from the Clubs' spring training facility establishments: Dayton
 19 Tortugas (Cincinnati Reds affiliate), Jacksonville Jumbo Shrimp (Miami Marlins affiliate), and
 20 Pensacola Blue Wahoos (also a Marlins affiliate). All other championship season activities in Florida
 21 take place at Clubs' spring training facility establishments, and the Clubs will rely upon the gross
 22 receipts test for those establishments. As to these 3 championship season establishments, Defendants
 23

24 ¹³ Broadcast revenue does not arise from patronage of the physical premises by the public, and was
 25 not considered in the only other prior case applying the receipts test to a MLB Club's spring training
 26 facility establishment. *See Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 595 (11th Cir. 1995) (discussing
 27 the six months receipts test under section 213(a)(3) for a Club's spring training facility establishment,
 28 and considering only revenue "from ticket sales, concession and parking revenues, promotional
 sponsorships, publication sales, advertising and other miscellaneous items," with no mention of
 broadcast revenue).

1 intend to satisfy the seasonal test by presenting witness testimony regarding the seasonal nature of the
2 championship season schedule, the length that each Club presents baseball activities at that
3 establishment, the number of year-round Club employees at each of the establishments at issue, as
4 well as the number of affiliate employees at the establishments and their responsibilities during the
5 off-season (though Defendants respectfully submit the latter is legally irrelevant).

6 *Second*, as set forth in Defendants' summary judgment motion (*see* Dkt. 973-1 at 7), the
7 Baltimore Orioles hold minor league spring training at the Buck O'Neil Complex, which is a separate
8 establishment from the Ed Smith Stadium (that is approximately 10 miles away), where the Orioles
9 hold major league spring training, extended spring training and instructional league. Plaintiffs do not
10 dispute this. The Orioles will present a witness to testify that the establishment is seasonal because it
11 operates for only 2 months each year (February/March), and the Orioles have only 3 year-round
12 employees at the establishment, plus a limited number of groundskeepers.

13 In their reply below, Plaintiffs do not agree to a bench trial regarding the seasonal exemption,
14 which contradicts what they previously represented to the Court. At the February 16, 2022
15 conference, Plaintiffs stated that they are amenable to the Court deciding this exemption. (*See*
16 Hearing Tr. at 43 (2/16/22).) Plaintiffs offer no justification for sending this complex, technical
17 defense, with very few (if any) disputed material facts to the jury, except by stating—devoid of any
18 specifics consistent with the rest of their plan—that “the exemption presents material factual issues
19 that the parties have the right to have a jury resolve.” However, the Court has already acknowledged
20 during oral argument on the parties' cross-summary judgment motions that there do not appear to be
21 any material disputed facts on the issue of the scope of the establishment, and thus this issue could be
22 decided by the Court based on a more complete factual record. (*See, e.g.*, Hearing Tr. at 48-49
23 (2/16/22).) Defendants' proposal presents an opportunity to streamline the issues for the jury to
24 consider, sparing the jury from having to consider a highly-technical defense that applies only to the
25 claims under the FLSA and Florida law.

26 Plaintiffs are also wrong in several respects regarding the purported inefficiencies of
27 Defendants' phased approach to the trial.

1 *First*, Plaintiffs’ assertion that witnesses will have to appear multiple times is vastly exaggerated.
2 As noted above, this phase of the trial could be tried remotely (if the Court preferred), which would
3 eliminate the need for witnesses to travel to and appear for live testimony on multiple occasions—
4 Plaintiffs provide no response to this aspect of Defendants’ proposal. Moreover, a number of
5 Defendants’ witnesses will only be designated to testify regarding the seasonal exemption—*e.g.*, the
6 witnesses related to the Clubs’ gross receipts, witnesses concerning the seasonal nature of certain
7 establishments, and the Clubs’ payroll records. The parties could also stipulate as to the undisputed
8 facts outside of the summary judgment record (as they did with respect to the facts submitted with the
9 summary judgment record, which revealed no disputed facts), including but not limited to, facts
10 derived from payroll records the Clubs produced during discovery, the Clubs’ media guides for each
11 year, and business record documents like player guides and rosters. The contents of these
12 documents—which cannot be disputed—will establish that payroll records contain information for
13 both major and minor league players; minor league players participate in major league spring training;
14 and front office executives, coaches and managers for major and minor league players are all
15 employed by the Club. These facts, which bear on the factors relevant to the scope of the
16 establishment, cannot reasonably be disputed and would streamline a trial on the seasonal exemption
17 significantly.

18 *Second*, Plaintiffs are wrong that Defendants’ proposed phased approach will result in a longer
19 trial. On the contrary, Defendants’ approach will result in a more efficient proceeding because even if
20 Plaintiffs demonstrate liability under Florida law and the FLSA, Defendants will be entitled to satisfy
21 the seasonal exemption as to those claims for each year. Thus, even if Plaintiffs satisfy their burden in
22 their case-in-chief regarding these claims, the seasonal exemption will have to be tried. However, if
23 Defendants prevail regarding the seasonal exemption, then the jury trial that follows will no longer
24 include Plaintiffs’ claims under Florida law and the FLSA—thus streamlining the subsequent jury trial
25 considerably.

26 *Third*, Plaintiffs’ contention that Defendants’ phased approach is improper because it
27 “divorce[s] the evidence about the defense from the anchoring contextual facts regarding liability and
28 damages” misses the mark. Unlike the questions in this case regarding liability and damages, which

1 consider the activities performed by minor league players, the length, nature and frequency of such
 2 activities, and whether they are compensable, the seasonal exemption “depend[s] on the character of
 3 the establishment by which an employee is employed,” not the “nature of the conditions of the
 4 employment of the particular employee.” *See* 29 C.F.R. 779.302. Thus, the evidence and
 5 considerations by the Court (or the jury) regarding the seasonal exemption depend on the nature of
 6 the establishments, which are vastly different than the evidence in the remainder of the case, which
 7 focuses on the players’ activities.

8 *Finally*, Defendants do not agree to Plaintiffs’ proposal to have a “bellwether” trial regarding the
 9 seasonal exemption, by cherry-picking two or more establishments. Unlike a mass tort litigation,
 10 where thousands of individual plaintiffs bring similar product liability claims for the same
 11 pharmaceutical drug, the seasonal exemption is not susceptible to a “bellwether” trial because it
 12 involves an analysis of each of the establishments at issue in this case, which in turn must be analyzed
 13 for each year during the limitations period. The resolution of the issues to be tried for one Club’s
 14 establishment for a particular year may not be the same for other years for that Club’s establishment,
 15 or for a different Club’s establishment. Indeed, the scope of the establishments may vary and the
 16 nature of the receipts or seasonal operations could differ by establishment, by year. There is simply
 17 no justification under the law (and Plaintiffs provide none) for Plaintiffs to shoehorn a trial regarding
 18 the seasonal exemption in a manner that would deprive each Club from presenting establishment-
 19 specific evidence to satisfy the exemption. Indeed, Plaintiffs’ proposal would violate the Rules
 20 Enabling Act because it would plainly deprive the Clubs of their ability to present individual evidence
 21 to meet the exemption. Plaintiffs’ proposal would also violate the seasonal exemption itself, which
 22 mandates an establishment-by-establishment and year-by-year analysis. The Court acknowledged the
 23 unmanageability of such a trial, but also acknowledged that it will not deprive the Clubs of their right
 24 to present evidence regarding this exemption. (*See* Hearing Tr. 48 (2/16/22).)

25 **2. After Resolving the Seasonal Exemption, the Court Must Try The Remaining**
 26 **Claims State By State and Team By Team.**

27 As explained in Defendants’ opposition to Plaintiffs’ bifurcation motion, in which Defendants
 28 proposed to bifurcate the California claims from the Arizona and Florida claims, it will be clearest for

the jury — and compelled by concerns of fairness to the Defendants — to try the case in phases. Trial could begin with the Florida claims, if they survive the preliminary trial of the seasonal exemption, as the state law issues are the simplest. Plaintiffs would be obligated to present evidence to prove hours worked by team and by workweek; Defendants would present evidence to challenge the amount of compensable time and to prove offsets against any such amounts from the per diem payments. The trial of the California Class’s claims could follow, and then the trial could turn to the Arizona claims.

III. PLAINTIFFS’ REPLY TO DEFENDANTS’ TRIAL PLAN

Defendant’s trial plan is not appropriate and should not be adopted by the Court for the reasons set forth below.

A. Defendants’ Improper Decertification Arguments.

Defendants begin their portion of this joint trial plan by recycling class certification and decertification arguments that have already been rejected by the Court multiple times. Moreover, the Ninth Circuit already has held that this case may proceed to trial as a class action. Raising those arguments in this document is both improper and at odds with the Court’s instruction that the parties work jointly and constructively to prepare a trial plan.

Defendants’ primary plan for trying this class action is to not try it as a class action at all. As with their improper motion for leave to move for decertification, Defendants again ignore the Ninth Circuit’s decision in this case: “This is not the rare case where predominance is defeated despite the existence of an employer’s ‘common practice or policy.’” *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019). Nearly all of Defendants’ issues go to determining the amount of damages owed—something that the Ninth Circuit has repeatedly held cannot defeat class certification, *including in this case. Id.*

Classwide liability has already been established in Arizona. But for the seasonal and amusement exemption, classwide liability has already been established in Florida. While that exemption is not an easy one for Defendants to prove at trial, it in no way requires a class-member-by-class-member inquiry. That is why the Ninth Circuit concluded in this case that the Florida and Arizona claims can be “easily resolved on a classwide basis.” *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 942

1 (9th Cir. 2019). With respect to the California Class claims, now that the Court has eliminated the
 2 creative artists exemption, the California Class claims are straightforward, because there are no
 3 defenses left for the jury to resolve. All that remains is for the jury to decide how many hours
 4 California Class members worked, and how much is owed. Plaintiffs may use “their representative
 5 evidence—especially the Main Survey and the testimony of players and league officials”—to make
 6 that showing. *Id.* at 947.

7 Defendants also reassert the unsuccessful argument that the survey is Plaintiffs’ only
 8 representative evidence of hours worked, again ignoring the schedules, evidence of game lengths,
 9 travel data, testimony, and other evidence, all of which will be sufficient to extrapolate to the classes.
 10 Defendants’ claim that they cannot determine whether the daily itineraries presented to the jury will
 11 be “representative,” is belied by the evidence. Dr. Kriegler chose a random sample of over 1,600 daily
 12 itineraries that his team coded. That random sample of itineraries has long been known to
 13 Defendants, and Defendants did not raise any concerns about the sampling methodology in their
 14 *Daubert* motion aimed at Dr. Kriegler. Plaintiffs intend to introduce other examples of daily itineraries
 15 that witnesses have either already testified about during depositions, and will testify about at trial.

16 Defendants’ related argument that the testimony will be “representative” is also incorrect. First,
 17 many of Defendants’ own witnesses have already confirmed the core workday that players perform.
 18 With respect to spring training, that is typically practice in the morning, and a game in the afternoon.
 19 Admissions from Defendants about the work that players typically perform is representative evidence.
 20 Second, the class representatives and over 20 opt-in plaintiffs in this case—who have been known to
 21 Defendants for years— provided consistent and straightforward testimony about standardized work
 22 routines in depositions. *See DeLuca v. Farmers Ins. Exch.*, No. 17-CV-00034-EDL, 2019 WL 4307940, at
 23 *7 (N.D. Cal. Sept. 11, 2019) (“[T]here is no magic formula for the number or percentage of plaintiffs
 24 who must testify, and instead, it is axiomatic that the weight to be accorded evidence is a function not
 25 of quantity but of quality.” (Internal quotations omitted)). There is no mystery about the
 26 representative nature of that testimony from the pool of over 60 players (class representatives and
 27 deposed opt-ins), including which worksites or work periods that the testimony pertains to. Third, an
 28 additional layer of testimony will come from some former managers who Plaintiffs anticipate will

1 willingly testify in Plaintiffs’ case-in-chief, providing additional powerful, representative evidence that
 2 is sufficient to apply to the classes as a whole. Finally, Defendants misleadingly claim that Dr.
 3 Kriegler’s model does not allow for individual damage calculations when Dr. Kriegler has proposed
 4 an unchallenged methodology for distributing the amount recoverable for individual class members
 5 based on the amount of work they performed during the class periods. *See e.g.* Kriegler Report (ECF
 6 No. 984-2) at Section IX, p. 79.

7 The main case Defendants rely upon, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th
 8 Cir. 2013), precedes the Supreme Court’s *Tyson Foods* case, is at odds with the Ninth Circuit’s holding
 9 that individualized damages inquiries do not defeat certification, and is factually distinguishable. In
 10 *Espenscheid*, the plaintiffs were satellite technicians who worked alone—not baseball players who work
 11 as a team according to an orchestrated work script that has been followed across the industry for
 12 decades. The plaintiffs relied solely on witness testimony—not a sample of 1,600 daily itineraries, and
 13 not a survey of hundreds of class members buttressed by testimony. Further, the case involved only
 14 overtime; liability had not been established yet. Here, by contrast, liability has already been established
 15 for one of the classes and has almost been established for the other two.¹⁴

16 Moreover, *Espenscheid* has been distinguished and criticized by a number of courts on several
 17 grounds. *See, e.g., Campbell v. City of Los Angeles*, 903 F.3d 1090, 1111 (9th Cir. 2018) (criticizing
 18 *Espenscheid* and its aim for “simplification”). In *Dilts v. Penske Logistics, LLC*, No. 08CV318-CAB
 19 (BLM), 2013 WL 12095058, at *1 (S.D. Cal. Mar. 5, 2013), the defendants relied on *Espenscheid* to
 20 make the same argument, that “a class wide trial cannot productively go forward because Plaintiffs
 21 have no evidence, admissible or otherwise, that would establish class wide liability and no plan for
 22
 23

24 ¹⁴ Other cases relied upon by Defendants are distinguishable as well. *See Cruz v. Dollar Tree Stores, Inc.*,
 25 No. 07-2050 SC, 2011 WL 2682967, at *4 (N.D. Cal. July 8, 2011) (case involved the executive
 26 exemption, not at issue here, which required individualized inquiry for purposes of the defense);
 27 *Weigle v. FedEx Ground Package Sys., Inc.*, 267 F.R.D. 614, 622 (S.D. Cal. 2010) (same defense); *Feltz v.*
 28 *Cox Commc’ns Cal., LLC*, No. CV192002JVSJDEX, 2021 WL 4947306, at *5 (C.D. Cal. Oct. 21, 2021)
 (PAGA claims involved “an individualized defense” not at issue here); *Sweet v. Pfizer*, 232 F.R.D. 360,
 363 (C.D. Cal. 2005) (plaintiffs proposed a nationwide class for nine different potential types of tort
 liability).

1 proving the damage claims of individual class members.” The *Dilts* court held that *Espenscheid* “is not
 2 binding on this Court, and it is factually distinct because this Court has already found that there triable
 3 issues subject to common proof.” *Id.* Similarly in *Balasanyan v. Nordstrom, Inc.*, 294 F.R.D. 550, 572
 4 (S.D. Cal. 2013), the court rejected the argument—based on *Espenscheid*—that “a survey of putative
 5 class members,” who numbered around 27,000 and worked at 32 different stores, would violate due
 6 process, reasoning that *Espenscheid* involved more “subjective assessments.” *Id.*; see also *Braun v. Wal-*
 7 *Mart Stores, Inc.*, 630 Pa. 292, 310, 106 A.3d 656, 667 (2014), *cert. denied*, 136 S. Ct. 1512 (2016)
 8 (rejecting argument that the class action had “run amok,” resulting in a “trial by formula” for 187,979
 9 workers who were awarded over \$180 million in damages for unpaid work).

10 There will be no “shapeless, freewheeling trial,” in this case, as Defendants argue. It will be a
 11 straightforward trial shaped by indisputably common evidence of liability, like the Uniform Player
 12 Contract, and common evidence of damages in the form of documents and testimony from players,
 13 managers, schedules, and experts—all confirming that players work long hours for little or no pay in
 14 these work periods.

15 **B. Defendants Are Jointly and Severally Liable.**

16 Defendants next argue that Plaintiffs must “prove their case against each Defendant
 17 individually” and that there is no “defendant class” because each Defendant is a separate entity. They
 18 ignore, however, that (1) all 30 Major League Clubs are members of the unincorporated association
 19 that is Major League Baseball, and (2) all engaged in a common scheme as part of that association,
 20 and (3) MLB has been held to be a joint employer. It is inappropriate to break out damages
 21 defendant-by-defendant where, as here, one Defendant is an unincorporated association of (and is
 22 jointly and severally liable with) the other Defendants.

23 First, because Major League Baseball is a joint employer, it is liable for *all* the damages at issue.
 24 “In keeping with the general rule that an unincorporated association is not a legal entity apart from its
 25 members, the members of an unincorporated association may be held civilly liable as individuals for
 26 the acts or omissions of the association.” 6 Am. Jur. 2d Associations and Clubs § 27. That means each
 27 Club, as a member of the unincorporated association, is civilly liable for all those damages caused by
 28 the actions of Major League Baseball. That is the nature of joint and several liability for the acts of an

1 unincorporated association. *See also Guyton v. Howard*, 525 So.2d 948, 956 (Fla. Ct App. 1988)
 2 (“unincorporated associations whose functions are . . . business or profit . . . are governed by
 3 partnership law.”); Fla. Stat. Ann. § 620.8306 (“all partners are liable jointly and severally for all
 4 obligations of the partnership unless otherwise agreed by a claimant or provided by law.”);
 5 Restatement (Third) of Torts: Apportionment Liab. § 15 (2000) (“The joint and several liability of
 6 those engaged in concerted activity is for the total comparative responsibility assigned to all who
 7 engage in the concerted activity.”). Plaintiffs’ trial plan—proceeding with liability and damages in its
 8 case-in-chief for all classes and against all defendants—is therefore appropriate, and there is no need
 9 to try the case against each Defendant one after the next.

10 Moreover, it would be inappropriate to break out the damages amount by Defendant on the
 11 verdict form, because doing so is highly likely to cause juror confusion. When joint and several
 12 liability applies,

13 [t]he form should not be structured in a way that would invite the jury to divide the
 14 damages for a single injury among defendants or theories of recovery. A verdict form
 15 that takes a jury through these steps in this sequence—reinforced by clear instructions
 16 from the court not to duplicate damages or divide the amount among defendants—
 17 will go far to help future litigants avoid the problems that arose in this case. Tort
 18 concepts of single indivisible injuries and joint and several liability are potentially
 19 confusing for a jury, and verdict forms should help remedy potential confusion, not
 20 add to it.

21 *Thomas v. Cook Cty. Sheriff’s Dep’t*, 604 F.3d 293, 311 (7th Cir. 2010); *Louis Vuitton Malletier, S.A. v.*
 22 *Akanoc Sols., Inc.*, 658 F.3d 936, 947 (9th Cir. 2011) (error in jury instructions to separate out liability
 23 per defendant when defendants were jointly and severally liable and only one award should have been
 24 awarded).

25 As for the seasonal and amusement exemption, the jury will be informed as to how much is at
 26 stake for each putative establishment. To the extent the parties disagree on the exact amounts, each
 27 can present their own numbers. To the extent the jury finds an establishment is exempt, the jury will
 28 simply subtract that amount from the damages award on the verdict form.

C. Defendants' Proposed Phased Approach Is Inefficient and Would Waste the Jury's Time and Judicial Resources.

Two days before this submission was due, Defendants proposed for the first time a phased trial structure, whereby the seasonal amusement and recreational establishment exemption would be tried first (to the Court), before a jury trial on liability and damages.¹⁵

The seasonal amusement exemption involves factual issues for the jury, which prevent Plaintiffs from agreeing to a bench trial on Defendants' affirmative defense.¹⁶ To the extent the seasonal amusement exemption is not resolved by further order of the Court on summary judgment in advance of trial,¹⁷ the exemption presents material factual issues that the parties have the right to have a jury resolve. Plaintiffs respectfully choose to exercise their right to a jury trial on those issues. *See Begolli v. Home Depot U.S.A., Inc.*, 701 F.3d 1158, 1160 (7th Cir. 2012) (“[I]n a case in which a party is entitled

¹⁵ Following the status conference on March 25, 2022, the parties conducted a meet and confer call on Monday, March 28. During that call, Plaintiffs understood Defendants to say that they did not intend to propose a phased approach, and instead planned to try the seasonal and amusement exemption during the defense case-in-chief, because they agreed that it would be inefficient to call multiple witnesses multiple times. Plaintiffs do not fault Defendants for changing their position, but note that Plaintiffs first became aware of the above proposal regarding a phased approach trying the seasonal and amusement exemption separately (and first) on April 6, two days prior to the April 8 filing deadline.

¹⁶ Defendants incorrectly attempt to fault Plaintiffs for exercising their right to have a jury decide this defense, arguing that Plaintiffs have been inconsistent. During the summary judgment hearings, Defendants first agreed to have the Court resolve the issue based on the summary judgment record only to then reverse course days later, after Plaintiffs agreed to do so. Plaintiffs were happy to have the Court decide the issue *on the record at summary judgment*. But some of the factual questions at issue for the exemption have not been the subject of as significant discovery as the other issues in the case (or, in the case of television receipts, any discovery at all since those receipts were never produced). Plaintiffs choose to exercise their right to a jury trial on those questions. Plaintiffs have proposed a way to accomplish that without undue complexity: bellwether trials. It is Defendants' prerogative to decline that invitation—Plaintiffs agree that the Court cannot force them to use two bellwether facilities. By declining that option, it is Defendants who are making this trial unnecessarily complex, not Plaintiffs.

¹⁷ Plaintiffs maintain their position that the Court should grant summary judgment that the seasonal and amusement exemption does not apply, for all the reasons set forth in their summary judgment briefing, including that: (1) the minor league spring training facilities are not for an “amusement” purpose because no tickets are sold and no fans attend, and (2) because major and minor league facilities are separate establishments, particularly the facilities that are physically separated by between a half mile and nine miles, including the facilities of the Giants, Yankees, Blue Jays, Pirates, Athletics, Red Sox (pre-2012), and Orioles.

1 to, and demands, a jury trial, defenses are tried to the jury along with the case in chief.”); *Kuehner v.*
 2 *Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996), *as amended* (July 5, 1996).¹⁸

3 Plaintiffs oppose Defendants’ proposal to proceed with a phased trial, with trial on the
 4 seasonal amusement exemption proceeding first, followed by trial on liability and damages second.
 5 The phased approach proposed by Defendants is inefficient and inferior to the non-phased approach
 6 proposed by Plaintiffs for numerous reasons. The phased approach will require the parties to call the
 7 same witnesses multiple times—first during the initial trial on the seasonal and amusement exemption,
 8 and second during the subsequent trial on liability and damages. The burden on plaintiff witnesses
 9 from having to appear multiple times is significant and unnecessary. It makes no sense to have, *e.g.*, a
 10 player testify first about the lack of interchange of employees between the major league and minor
 11 league spring training facilities, and then come back weeks later to testify again about his work
 12 activities at those same minor league training facilities. Those facts go hand-in-hand. It is likely that
 13 Defendants would call the same witnesses multiple times as well to first testify about interchange of
 14 employees and training facilities, and then later about work activities at those same facilities, both of
 15 which involve testimony about the work activities of the same players at the same places. The phased
 16 approach is also inferior because will result in a much longer trial. There will be multiple openings and
 17 closings, overlapping witness testimony that will end up longer than it would be in a single trial, and
 18 multiple sets of jury deliberations. The seasonal and amusement exemption will not become less
 19 complex simply by putting it first—it will simply divorce the evidence about the defense from the
 20 anchoring contextual facts regarding liability and damages. Defendants argue otherwise by pointing
 21 out that the nature of the purported establishment is at issue, but determining what the appropriate
 22 establishment is will require an inquiry into where the players performed activities (at minor league

23
 24
 25 ¹⁸ See *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) (affirming
 26 district court’s denial of defense motion for judgment as a matter of law on amusement exemption
 27 because “the jury reasonably could have found, as it did, that [defendants] failed to carry their burden
 28 of establishing that they were entitled to the recreational and amusement exemption”); *Feagley v. Tampa*
Bay Downs, Inc., No. 8:11-CV-564-EAK-MAP, 2012 WL 2178857, at *5–6 (M.D. Fla. June 13, 2012);
see also Lorillard v. Pons, 434 U.S. 575, 580 (1978) (discussing right to jury trial in FLSA actions); *Kuehner*
v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996), *as amended* (July 5, 1996) (same).

1 facilities, not major league facilities), which will necessarily involve a discussion of those activities—
2 which will significantly overlap with testimony about the same activities for purposes of establishing
3 hours worked. Trying the seasonal and amusement exemption first would be inefficient and highly
4 likely to cause juror confusion.

5 The Court should follow the standard approach: Plaintiffs put on their case-in-chief,
6 Defendants put on their case-in-chief, and Plaintiffs put on a rebuttal case, if necessary.

7 To reduce the complexity of the seasonal and amusement exemption for the jury, and to reduce
8 the length of the trial, Plaintiffs propose that the parties agree to try two or more “bellwether”
9 establishments after Plaintiffs present their case-in-chief. Plaintiffs propose that the parties attempt to
10 reach agreement regarding two establishments—one for which major league and minor league spring
11 training facilities are physically distant from each other, and a second for which the major league and
12 minor league spring training facilities are physically adjacent, but on the same parcel of land. The
13 parties may mutually agree in advance that whatever findings the jury reaches with respect to the
14 “bellwether” establishments apply to all the other establishments of that type. This would dramatically
15 reduce the number of witnesses, volume of evidence, duration of trial, and complexity of trial on the
16 seasonal and amusement exemption. Defendants currently disagree with this proposal, which is their
17 prerogative. But the complexity and duration of the ensuing trial falls on their shoulders. They do
18 not explain how a purported establishment could vary by year. The physical layout and the
19 interchange of employees is unlikely to vary by year, its purpose is unlikely to change, and the receipts
20 issue is unlikely to change by year. Neither do Defendants explain how two bellwether establishments
21 would not adequately capture all the factual questions at issue. Plaintiffs are amenable to continuing
22 to meet and confer with Defendants in the hopes the parties’ differences on this proposal can be
23 resolved, so the issue can be tried to the jury in an efficient and sensible fashion.

24 Plaintiffs also oppose Defendants’ proposal to try the Florida claims first, followed by the
25 California claims, and then the Arizona claims in a separate trial. This approach is inefficient and
26 would waste judicial resources. The factual issues overlap significantly across the claims, and many of
27 the witnesses will be testifying about claims in multiple states—and sometimes all three states. That is
28

1 because numerous players and coaches worked in multiple states. Expert testimony addresses all three
2 claims as well. Liability and damages on all claims should be tried together.

3
4 DATED: April 8, 2022

Respectfully submitted,

5
6 /s/ Bobby Pouya

7 **PEARSON, SIMON & WARSHAW LLP**

CLIFFORD H. PEARSON

THOMAS J. NOLAN

8 DANIEL L. WARSHAW

BOBBY POUYA

9 BENJAMIN E. SHIFTAN

JILL M. MANNING

10 **KOREIN TILLERY, LLC**

11 STEPHEN M. TILLERY (pro hac vice)

12 GARRETT R. BROSHUIS

MARC WALLENSTEIN (pro hac vice)

13 DIANE MOORE

14 *Plaintiffs' Co-Lead Class Counsel*

15 /s/ Elise M. Bloom

16 **PROSKAUER ROSE LLP**

17 ELISE M. BLOOM (pro hac vice)

NEIL H. ABRAMSON (pro hac vice)

18 ADAM M. LUPION (pro hac vice)

MARK W. BATTEN (pro hac vice)

19 RACHEL S. PHILION (pro hac vice)

NOA M. BADDISH (pro hac vice)

20 JOSHUA S. FOX (pro hac vice)

PHILIPPE A. LEBEL

21 SAMANTHA R. MANELIN (pro hac vice)

22 *Attorneys for Defendants*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered for electronic filing.

/s/ Bobby Pouya
Bobby Pouya